No. 12882

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT O. NORMAN,

Appellant,

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLEE

On Appeal from the United States District Court for the District of Oregon.

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STATEMENT OF THE CASE

This action was commenced in the United States District Court for the District of Oregon by a resident of the State of Washington against a Washington corporation (Tr. 11). Appellant, an employee of Gilpin Construction Company, brought suit against appellee

under the Federal Employers' Liability Act (hereinafter referred to as F.E.L.A.) to recover damages for personal injuries sustained by him on January 10, 1947, when he fell a distance of between sixty and seventy feet to the ground from an Oregon railroad trestle, known as Rockton Bridge, owned and used by appellee (Tr. 12, 13).

This appeal is taken from a judgment of dismissal entered after trial upon findings of fact and conclusions of law (Tr. 11-16). The findings are based in part upon a stipulation between the parties, filed after the case was submitted, and in part upon testimony and evidence presented by the parties at a separate trial of the issue of appellee's liability to appellant under the F.E.L.A. The trial was had before the court sitting without a jury (Tr. 8).

The record which appellant has designated in this Court consists only of Judge Fee's opinion, the findings of fact and conclusions of law, the judgment order, the notice of appeal, the clerk's certificate, and the statement of points and designation of record. Appellant has not included the oral testimony or any exhibits in the transcript of record.

Hence, the findings of fact are conclusively presumed to be supported by the evidence and cannot be questioned here. The only issue on this appeal is whether the findings support the judgment of dismissal. (*Griffiths Dairy, Inc. v. Squire,* 138 F. (2d) 758, 760 (C.A. 9)).

STATEMENT OF THE FACTS

On January 10, 1947, the date of the accident which gave rise to this action, and for a long time prior thereto, appellant was employed by and working for Gilpin Construction Company (hereinafter referred to as Gilpin) as a member of one of its construction crews which was engaged on that day in the work of repairing and enlarging Rockton Bridge. At the time of the accident, and for a long time prior thereto, appellant was and had been acting under the direction and control of Gilpin, and not of the appellee (Tr. 13).

On or about October 27, 1944, appellee entered into a contract with Gilpin whereby for a sufficient consideration the latter undertook and agreed to do repair and maintenance work on appellee's trestles and bridges, including Rockton Bridge, and to furnish the equipment, tools and labor to do that work (Tr. 12). Gilpin, an Oregon corporation, had been engaged for many years in a general contracting business, including the construction, maintenance and repair of railroad trestles and bridges. It was a wholly independent corporation (Tr. 12).

The relationship established by the contract and the performance of the contracting parties thereunder at the time of the accident was that of true independent contractor and contractee (Tr. 13). Gilpin had unrestrained power to and did direct the manner and method of doing the work of repairing and maintaining the Rockton Bridge, and to choose its employees. Appellee made no

attempt to delegate any of its responsibility to Gilpin, but by its contract with Gilpin simply entered into a normal transaction of letting necessary repair work to an independent contractor (Tr. 14). Gilpin was in fact a true independent contractor acting under a *bona fide* contract which was not designed or intended as, and in fact was not, a scheme or an artifice to evade the provisions of the F.E.L.A. (Tr. 13).

In spite of the fact that appellant does not question the sufficiency of the evidence to support these findings, he has persisted throughout his brief (App. Br. pp. 2, 8, 18, 27, 35, 37, 40, 47, 60) in making factual assertions, some *dehors* the record, and others in direct contradiction to the findings. The statement is made, and reiterated many times, that during the construction work appellee retained control and the constant use of the bridge and tracks (App. Br. pp. 2, 35, 37, 40 and 60). Furthermore, appellant baldly states as a fact that Gilpin was appellee's "agent or foreman, or as nowadays described, its vice-principal." (App. Br. p. 47). Again, it is said, "the appellee at all times had complete and absolute control as a proprietor of the premises and at any time it could stop or continue and determine the way in which the work should be done—" (App. Br. p. 27). Still again, appellant suggests that the work was of such a nature that "in fact" appellee "was unable to divest itself of control." (App. Br. p. 8). Although there is nothing in the findings to indicate that the work being performed at the time of the accident was dangerous, appellant assumes that to be the fact (App. Br. p. 18).

While the decision of this Court will be controlled by the facts shown in the record before it (*Leonard v. Field,* 71 F. (2d) 483, 487 (C.A. 9)), appellee feels that it is incumbent at the outset to point out the wide discrepancy between the actual facts before this Court, and what appellant has assumed them to be. This coloring of the facts has naturally affected appellant's viewpoint in regard to the correct principles of law governing this case.

STATUTES INVOLVED

Section 1 of the Federal Employers' Liability Act, as amended (45 U.S.C.A., Sec. 51), provides as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Section 5 of the same chapter (45 U.S.C.A., Sec. 55) provides, in pertinent part:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: * * * ."

SUMMARY OF ARGUMENT

A plaintiff who invokes the special benefits of the Federal Employers' Liability Act must establish that at the time of the occurrence of the injury: (1) the defendant was a common carrier by railroad in interstate or foreign commerce, and (2) that he suffered injury while he was employed by the carrier in such commerce (*Kelly v. Delaware River Joint Commission,* 85 F. Supp. 15 (D.C. Pa.)). It is fundamental that " . . . Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." (*Robinson v. Baltimore and Ohio Railroad Co.,* 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849; *Hull v. Philadelphia & R. Ry. Co.,* 252 U.S. 475, 40 S. Ct. 358, 64 L. Ed. 670).

In this case, the unchallenged findings demonstrate that at the time of the occurrence of his injury, appellant was employed by and working for Gilpin Construction Company as a member of one of its construction crews, that he was acting under Gilpin's exclusive direction and control, and that Gilpin had the unrestrained power to and did direct the manner and method of doing the work, and also had the power to choose its employees (Tr. 13-14). Consequently, appellant, not being an employee of appellee, cannot maintain this action under the F.E.L.A.

The stipulation between the parties and the findings further establish that Gilpin was in fact a true independent contractor acting under a *bona fide* contract which was not designed or intended as, and in fact was not, a scheme or artifice to evade the provisions of the F.E.L.A. (Tr. 10, 13). Accordingly, appellant cannot contend that the contract, which is not included in the record, is void, as in violation of Section 5 thereof (45 U.S.C.A., Sec. 55).

The experienced District Judge, whose opinion shows that he devoted much time and study to this case, concluded (Tr. 6):

> "Of the hundreds of cases which have been reviewed by the Court, none suggests that an employee of a true independent contractor erecting or repairing a bridge on a right of way becomes an employee of the railroad company because the duty of construction and repair of such bridges cannot be delegated. No case suggests that the employee of an independent contractor becomes an employee pro

hac vice under such circumstances. In view of the history of such construction by independent contractors ever since railroads have been in existence, it is necessary to answer that the employees of the contractor do not become employees of the railroad by any legal theory. This does not derogate from the duty of the railroad to construct and repair such structures. But the duty is not to plaintiff but to its passengers."

ARGUMENT

A. Employees of a Bona Fide Independent Contractor May Not Sue a Railroad Under the F.E.L.A.

The leading United States Supreme Court case so holding is *Chicago, R. I. & P. R. Co. v. Bond,* 240 U.S. 449, 36 S. Ct. 403, 60 L. Ed. 735, which this Court recently cited with approval in *Brown v. Luster,* 165 F. (2d) 181, 184, note 2. In the *Bond* case, the railroad entered into a contract with the plaintiff's intestate for the shoveling of coal on a per-ton basis. He was to remove all coal from cars into coal chutes in such amount and at such times as required by the company. He was also to break the coal into appropriate sizes, gather up coal that fell from the chute pockets to the ground, and place the same on cars or engines as desired by the company. The railroad was to furnish the necessary tools for the job and to keep a record of all coal delivered. Payments were based on the amount of coal handled as determined by daily reports of cars unloaded by the decedent. He was required to submit a report

and furnish a certification from each engine man, hostler or other employee showing the number of tons of coal delivered to any engine. The Supreme Court reversed a judgment in favor of the plaintiff in an action brought under the F.E.L.A. on the ground that under the contract the railroad had not retained the right to direct the manner in which the work was to be done or to control the results to be accomplished. Therefore, he was an independent contractor and not entitled to the benefits of the F.E.L.A. The Supreme Court also rejected the contention that the contract was a violation of Section 5 of the F.E.L.A., and held that the decedent was not incompetent to assume the relationship of an independent contractor to the railroad.

Two other United States Supreme Court decisions, *Robinson v. Baltimore and Ohio Railroad Co.,* 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849, and *Wells-Fargo & Co. v. Taylor,* 254 U.S. 175, 41 S. Ct. 93, 65 L. Ed. 205, reach a similar result. They hold that where a railroad contracts with another company for the furnishing of facilities, or services, or the performance of work necessary to the fulfillment of its own obligations to the public, the employees of such other company remain the employees of the contractor and may not claim the benefits of the F.E.L.A.

These decisions have never been expressly or impliedly overruled by the United States Supreme Court. Their principles have been recently approved by this Court in its *per curiam* affirmance of Judge Goodman's decision in *Gaulden v. Southern Pacific Company,* 78 F.

Supp. 651 (D.C. Cal.), aff'd 174 F. (2d) 1022, "on the grounds and for the reasons stated in the opinion of the trial court." In that case, an employee of Pacific Fruit Express Company sued his employer and the railroad under the F.E.L.A. The court dismissed the action as against the express company on the ground it was not "a common carrier by railroad." It was also contended that the express company was no more than railroad's agent, and hence that the latter was the plaintiff's real employer and subject to suit under the F.E.L.A. However, the district court found that the Protective Service Contract, by its terms, as well as by the manner of its performance, constituted the parties independent contractors. The court also found that the express company performed with its own employees at its own expense, and that no right of control over the manner and means of performance had been reserved, even though certain conditions of performance and means of cooperation and assistance were specified in the contract. It was held that these provisions which were directed to the successful accomplishment of the contract's broad objectives did not invest the railroad with control of the method of performance. Therefore, the action was dismissed against both defendants.

The *Gaulden* case has been approved and followed in recent decisions of other federal and state courts.

In *Kelly v. Delaware River Joint Commission,* 85 F. Supp. 15 (D.C. Pa.), the plaintiff at the time of injury, was engaged in painting a portion of a bridge structure overhanging a railroad right of way. He was

hired by J. I. Hass Co., Inc., a painting contractor then engaged in maintaining the bridge and the railroad right of way. He sued The Delaware River Joint Commission, Philadelphia Transportation Co. and J. I. Hass Co., Inc., under the F.E.L.A. On motion, the action was dismissed against the employer on the ground that it was not a "common carrier by railroad." Although the other two defendants were deemed "common carriers by railroad," their motions to dismiss were also granted on the ground that no suit "* * * can be entertained if the injury is sustained by an employee of an independent contractor." The *Bond* and *Gaulden* cases were cited by the court as supporting this established principle of law.

The *Gaulden* case was relied upon by the Supreme Court of Utah in *Moleton v. Union Pacific R. R. Co.*, 219 P. (2d) 1080, where a judgment of nonsuit was affirmed in an action under the F.E.L.A. brought against the railroad and the Pacific Fruit Express Company by an employee of the latter whose job was to descend into refrigerator car bunkers to regulate burning heaters which generate carbon monoxide gas. The plaintiff contended that in performing his duties he was in reality doing the railroad's work and was under its control and direction. However, the court found that the work he was doing was for his own employer, although the railroad would ultimately benefit from it. It was further held that the evidence did not indicate a control by the railroad of the performance of his duties, but only suggestions as to details. The court con-

cluded that he had no right to sue either the railroad or his employer under the F.E.L.A.

The Court of Appeals for the Sixth Circuit in *Jones v. New York Central R. Co.,* 182 F. (2d) 326, cert. den. 340 U.S. 850, 71 S. Ct. 78, 95 L. Ed. 38, also has recently cited the *Gaulden* case with approval. This was a suit brought under the F.E.L.A. by an express messenger for Railway Express Agency, Inc., against his employer and the railroad for damages on account of injuries sustained while he was reboarding an express car forming part of a train. A judgment of dismissal after trial upon a stipulation of facts was affirmed on appeal. The court held that the express company was not a "common carrier by railroad." The dismissal of the action as against the railroad was affirmed upon the authority of the *Robinson* case. The court held that to treat the plaintiff as an employee of the railroad which did not employ him would be to disregard the separate legal entity of the express company, and that there was "no showing of special circumstances to justify such a result." (182 F. (2d) at p. 328).

Other decisions which accord with the United States Supreme Court cases cited above, and with this Court's decision in the *Gaulden* case, are listed below. They all hold that a railroad company may commit work of all types to independent contractors without being subject to suit under the F.E.L.A. by employees of the contractor:

1. *Polluck v. Minneapolis & St. L. R. Co.,* 40 S.D. 186, 166 N.W. 641 (S. Ct. S.D.), cert. den. 248

U.S. 558, 39 S. Ct. 6, 63 L. Ed. 421, (contract to keep coal chutes filled and ashes out of turntable pit);

2. *Drago v. Central R. Co. of New Jersey,* 93 N.J. L. 176, 106 A. 803 (Ct. of E. and A. N.J.), cert. den. 251 U.S. 553, 40 S. Ct. 118, 64 L. Ed. 411, (contract to load and unload freight);

3. *Bugg v. Sanders,* 121 S. 410 (S. Ct. Ala.), (contract covering the transfer of freight from bad order to good order cars);

4. *Reynolds v. Addison Miller Co.,* 143 Wash. 271, 255 P. 110 (S. Ct. Wash.), (contract to furnish ice and to ice railroad cars);

5. *Orange v. Pitcairn,* 280 Ill. App. 566 (App. Ct. Ill.), (contract to reconstruct section of railroad track);

6. *Lees v. Chicago & N. W. Ry. Co.,* 339 Ill. App. 277, 89 N.E. (2d) 418 (App. Ct. Ill.), (contract to remove old damaged pile cluster and to install new one as part of railroad bridge);

7. *Klar v. Erie R. Co.,* 118 Ohio St. 612, 162 N.E. 793 (S. Ct. Ohio), cert. den. 279 U.S. 818, 49 S. Ct. 342, 73 L. Ed. 975, (contract to handle repair work on railroad engines and cars);

8. *Pittsburgh C. C. & St. L. R. Co. v. Parker,* 191 Ind. 686, 132 N.E. 372 (S. Ct. Ind.), (contract to build concrete bridges);

9. *Bogart v. New York Cent. & H. R. R. Co.,* 171 App. Div. 652, 157 N.Y.S. 420 (App. Div. N.Y.), (contract to carry freight);

10. *Missouri K. & T. R. Co. v. West,* 38 Okla. 581, 134 P. 655 (Sup. Ct. Okla.), (contract to handle baggage).

B. The Authorities Cited by Appellant Do Not Govern This Case.

Appellant has cited fifty-two cases in his brief. They are all distinguishable on their facts and on the questions of law there presented. To discuss them all in detail would necessitate extending this brief to inordinate lengths. However, for the purpose of analysis, they may be grouped and classified on the basis of the following controlling distinctions:

I. Employer-Employee Relationship Admitted.

In such cases as *Panama R. Co. v. Minnix,* 282 Fed. 47 (C.A. 5); *Chicago Junction R. Co. v. King,* 169 Fed. 372 (C.A. 7); aff'd on procedural grounds 222 U.S. 222, 32 S. Ct. 79, 56 L. Ed. 173; *Wilczynski v. Pennsylvania R. Co.,* 90 N.J.L. 178, 100 A. 226 (Ct. E. and A. N.J.); *Roberg v. Houston & T. C. R. Co.,* 220 S.W. 790 (Ct. of Civ. App. Tex.); *Blessing v. Camas Prairie R. Co.,* 3 W. (2d) 266, 100 P. (2d) 416 (S. Ct. Wash.); *Porter v. Terminal R. Ass'n,* 327 Ill. App. 645, 65 N.E. (2d) 31 (App. Ct. Ill.); *Vickers v. K. & W. V. R. Co.,* 64 W. Va. 474, 63 S.E. 367 (S. Ct. W. Va.), and *Miller v. Southern Pacific Co.,* 20 Or. 285 (S. Ct. Or.), the existence of an employer-employee relationship between the parties was admitted. These cases are merely illustrative of the absolute common-law duty imposed upon a master to furnish his own servants a reasonably safe place to work. A determination that an employer is burdened with such an obligation does not bear upon the question of the relationship giving rise to that duty.

Similarly in *N. Y. N. H. & H. R. Co. v. Bezue,* 284 U.S. 415, 52 S. Ct. 205, 76 L. Ed. 370; *Shanks v. D. L. & W. R. Co.,* 239 U.S. 556, 36 S. Ct. 188, 60 L. Ed. 436; *C. & E. I. R. Co. v. Industrial Commission,* 284 U.S. 296, 52 S. Ct. 151, 76 L. Ed. 304; *D. L. & W. R. Co. v. Yurkonis,* 238 U.S. 439, 35 S. Ct. 902, 59 L. Ed. 1397; *C. B. & Q. R. Co. v. Harrington,* 241 U.S. 177, 36 S. Ct. 517, 60 L. Ed. 941; *N. Y. C. R. R. Co. v. White,* 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667; *Industrial Accident Commission v. Davis,* 259 U.S. 182, 42 S. Ct. 489, 66 L. Ed. 888; *Pedersen v. D. L. & W. R. Co.,* 229 U.S. 146, 33 S. Ct. 648, 57 L. Ed. 1125, and in *Kamboris v. O.-W. R. & N. Co.,* 75 Or. 358, 146 P. 1097 (S. Ct. Or.), there was an admitted employer-employee relationship between the parties. The question before the court in these cases, all decided prior to the 1939 amendment to Section 1 of the F.E.L.A. (53 Stat. 1404), was whether at the time of injury the plaintiff was engaged in interstate transportation or work so closely related thereto as to be practically a part of it. Incidentally, the record herein contains a stipulation of the parties that such decisions do not bear on the basic issue in this case (Tr. 10).

II. Cases Where Negligence of Fellow-Servant Was a Valid Defense.

Cases such as *Sullivan v. Hannibal & St. Joseph R. Co.,* 107 Mo. 66, 17 S.W. 748 (S. Ct. Mo.); *C. & A. R. R. Co. v. Maroney,* 170 Ill. 520, 48 N.E. 953 (S. Ct. Ill.); *Gann v. Railroad Co.,* 101 Tenn. 380, 47 S.W. 493 (S.

Ct. Tenn.); *Ell v. Northern Pacific R. R. Co.,* 1 N.D. 336, 48 N.W. 222 (S. Ct. N.D.); *Willis v. O.-W. R. & N. Co.,* 11 Or. 257, 4 P. 121 (S. Ct. Or.); *Bloyd v. Railway Company,* 58 Ark. 66, 22 S.W. 1089 (S. Ct. Ark.); *Hough v. T. & P. Ry. Co.,* 100 U.S. 213, 25 L. Ed. 612; *Baltimore & Ohio R. R. Co. v. Baugh,* 149 U.S. 368, 13 S. Ct. 914, 37 L. Ed. 772, and *Northern Pacific Ry. Co. v. Herbert,* 116 U.S. 642, 29 L. Ed. 775, are also clearly irrelevant. They are all obsolete cases in which the defense of a fellow servant's negligence was asserted as a bar to recovery in suits where the relationship of employer-employee was conceded. The principle of law that these common law "fellow servant" and "vice-principal" theories cannot be applied in actions under the F.E.L.A. is too clear to require citation of authority. The contention that Gilpin was in effect an agent or vice-principal, because appellee retained complete and absolute control of the work, is directly refuted by the unchallenged findings of fact.

III. Nondelegable Duties to the Public.

In such cited cases as *Washington & Baltimore R. Co. v. Hahn,* 9 Sadler 364, 12 Atl. 479 (Super. Ct. Pa.); *Philadelphia B. & W. R. Co. v. Karr,* 38 App. D.C. 193 (Ct. of App. D.C.); *Lesher Wabash Navigation Co.,* 14 Ill. 84 (S. Ct. Ill.); *Venuto v. Robinson,* 118 F. (2d) 679 (C.A. 3), and *Kemp v. Creston Transfer Co.,* 70 F. Supp. 521 (D.C. Iowa), a theory of nondelegable duty was invoked by the courts to prevent the avoidance of liability to members of the public where the defendant

was engaged in the performance of business authorized by franchise. The underlying policy behind this rule as applied to members of the public is found in the fact that the public is not bound to know the relation existing between a company performing services for the public under franchise and its servants. (See cases collected, 28 A.L.R. 122-197).

Yet, the leading case of *Bibb's Adm'r v. Railroad Co.,* 87 Va. 711, 14 S.E. 163 (S. Ct. App. Va.), holds that this principle has no application where the plaintiff is employed by an independent contractor. In that case, a contractor named Smith was reconstructing a bridge for the railroad and employed Bibb on the job. One day a heavy train approached the bridge under construction and halted. Smith's foreman signalled that it might proceed. It did, the bridge broke and Bibb was killed. In an exhaustive opinion which reviews all the English and American authorities on the subject, the court denied a right of recovery against the railroad and held that the negligence of the contractor could not be imputed to the railroad.

Appellant places reliance upon a later decision by the same court in *Atlantic Coast Line R. Co. v. Treadway's Adm'x,* 120 Va. 735, 93 S.E. 560 (S. Ct. App. Va.), cert. den. 245 U.S. 760, 38 S. Ct. 191, 62 L. Ed. 540. There it was held that the duties of operating signals and keeping a special signal light which served the operation of the defendant's trains exclusively were non-assignable, in the sense that a switch tender paid by another carrier with whom defendant had a contract

for the maintenance of a railroad cross-over was an employee *pro hac vice* while engaged in performing these duties for the defendant. Therefore, the right to sue under the F.E.L.A. was sustained. In the *Treadway's Adm'x* case, the court distinguished the *Bibb's Adm'r* decision and held that it rested upon the principle that the responsibility of reconstructing a railroad bridge there delegated to the independent contractor was assignable, in so far as the railroad's liability to the employees of the negligent contractor was concerned.

The controlling authority on the application of this theory to F.E.L.A. cases is *Robinson v. Baltimore & Ohio R. Co.,* where Mr. Justice Hughes wrote (35 S. Ct. at p. 493):

> "It will be observed that the question is not whether the railroad company, by virtue of its duty to passengers, of which it cannot divest itself by any arrangement with a sleeping car company, would not be liable for the negligence of a sleeping car porter in matters involving the passenger's safety (*Pennsylvania Co. v. Roy,* 102 U.S. 451). Nor are we here concerned with the measure of the obligation of the railroad company, in the absence of special contract, to one in the plaintiff's situation by reason of the fact that he was lawfully on the train, although not a passenger. The inquiry rather is whether the plaintiff comes within the statutory description; that is, whether, upon the facts disclosed in the record, it can be said that within the sense of the act the plaintiff was an employee of the railroad company, or whether he is not to be regarded as outside that description, being, in truth, on the train simply in the character of a servant of another master by whom he was hired, directed and paid, and at whose will he was to be continued in service or discharged."

IV. Loaned Servant Cases.

Decisions involving the "loaned servant" doctrine have no application to this case, in view of the trial court's findings that appellant was acting under Gilpin's exclusive direction and control, and that Gilpin had unrestrained power to and did direct the manner and method of the work (Tr. 13-14). Cases cited by appellant which fall into this category include *The Standard Oil Company v. Anderson,* 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480, and *Linstead v. C. & O. Ry. Co.,* 276 U.S. 28, 48 S. Ct. 241, 72 L. Ed. 453. These cases support the established proposition of law that where one person lends his employee to another for a certain work, the performance of which is subject to the exclusive control of the other, the loaned servant becomes *pro hac vice* the employee of the borrowing employer. The Sixth Circuit case of *Cimorelli v. New York Central R. Co.,* 148 F. (2d) 575, and the two subsequent cases in the same circuit following it, *Roth v. Pennsylvania R. Co.,* 163 F. (2d) 161, cert. den. 332 U.S. 830, 68 S. Ct. 208, 92 L. Ed. 404, and *Pennsylvania R. Co. v. Barlion,* 172 F. (2d) 710, are governed by this principle. In these three cases, the court found that the work committed to the contractor involved many interdependent details of railroad operating procedure, and that the control of any one of these details could not be surrendered without disorganization of the whole. Thus, the contractor and its employees were necessarily subject to the railroad's control in the method and manner of doing their work. From these facts, the court concluded that the contractor's employees while engaged in the work were

pro hac vice employees of the railroad under the doctrine of *Singer Mfg. Co. v. Rahn,* 132 U.S. 518, 10 S. Ct. 175, 33 L. Ed. 440, and the *Anderson* case. In *Gaulden v. Southern Pacific Company,* 78 F. Supp. 651, aff'd 174 F. (2d) 1022, Judge Goodman pointed out the decisive feature of these cases:

> " * * * that substantial degree of control over the manner and means of performance as was present in Pennsylvania R. R. Co. v. Roth and like cases."

V. Cases Under the Federal Safety Appliance Act (45 U.S.C.A., Secs. 1-46).

There is no analogy between such cases as *Brady v. Terminal R. R. Ass'n,* 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 615; *Fairport, P. & E. R. R. Co. v. Meredith,* 292 U.S. 589, 54 S. Ct. 826, 78 L. Ed. 1446; and *Louisville & Nashville R. Co. v. Layton,* 243 U.S. 617, 37 S. Ct. 456, 61 L. Ed. 931, and the case at bar. These decisions merely stand for the proposition that a violation of the Federal Safety Appliance Act may be a breach of duty on the part of the railroad creating liability in favor of other classes of persons than employees.

VI. Duty Owed to Invitee on Railroad Premises.

The fundamental weakness of appellant's position is strikingly illustrated by his reliance upon *Michelsen v. Erie R. R. Co.,* 106 N.J.L. 147, 147 A. 535 (Ct. of E. & A. N.J.). In that case, a recovery was allowed against the railroad for its failure to discover patently defective

stakes which supported a load of logs on a car delivered to a consignee. The court held that the railroad owed the consignee's employee a duty of exercising reasonable care in its inspection of the car. It was not an action under the F.E.L.A., but merely a so-called "third-party action" by the widow of a business invitee to whom the railroad owed a common-law duty of exercising reasonable care. Whether appellant, as a Gilpin employee, could maintain a common-law action against appellee on account of Gilpin's alleged negligent acts, is a question which is not before this Court. (Compare *Kelly v. Delaware River Joint Commission,* 85 F. Supp. 15 (D.C. Pa.), with *Kelly v. Philadelphia Transp. Co.,* 363 Pa. 490, 70 A. (2d) 288 (S. Ct. Pa.); and see *Pritt v. Terminal R. R. Ass'n of St. Louis,* 359 Mo. 896, 224 S.W. (2d) 119 (S. Ct. Mo.)).

VII. Violation of Section 5 of the F.E.L.A.

Appellant's reliance on *Erie Railroad Co. v. Margue,* 23 F. (2d) 664 (C.A. 6), is clearly misplaced. In that case, the court held that the defendant railroad's contract with a construction company for the maintenance of its right of way was void under section 5 of the F.E.L.A. The fact that the contract provided that the construction company was to comply with the state compensation laws, and that the construction company was largely organized and controlled by former employees of the defendant, were some of the special circumstances leading the court to find that the contract was entered into for the purpose of, and with the intent of, evading liability under the statute. As pointed out

above, the most recent decision of the Court of Appeals for the Sixth Circuit in *Jones v. New York Central R. Co.,* (supra) indicates that only when special circumstances of that kind are present is a court justified in disregarding the separate legal entity of the contractor. The findings of fact disclose the absence of such circumstances in the case at bar. Here the district court found that the contract between appellee and Gilpin "was not designed or extended as, and in fact was not, a scheme or artifice to evade the provisions of the Federal Employers' Liability Act" (Tr. 13).

VIII. Cases Under the Jones Act (46 U.S.C.A., Sec. 688) Accord with F.E.L.A. Decisions.

Appellant's position is not supported by the United States Supreme Court case of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, followed by this Court in *United States v. Arrow Stevedoring Co.,* 175 F. (2d) 329. These cases were not brought under the "Jones Act" (46 U.S.C.A., Sec. 688), which extends the benefits of the F.E.L.A. to seamen injured in the course of their employment. Indeed, in the *Sieracki* case, it was conceded that the Jones Act did not apply because plaintiff's suit was not against his employer (57 F. Supp. 724, 726). The same contention made here by appellant was rejected in *Continental Cas. Co. v. Thorden Line,* 186 F. (2d) 992 (C.A. 4). In affirming the dismissal of a suit under the Jones Act brought in the right of a deceased employee of a contracting stevedore company against a ship operator, the Court of Appeals for the Fourth Circuit held that the

extension of the obligation of seaworthiness to longshoremen by the *Sieracki* case " * * * does not abrogate the rule that the Jones Act only applies where the relationship of employer and employee exists." (186 F. (2d) at p. 995).

It is well established in this Court, as elsewhere, that an injured seaman is granted a cause of action by the Jones Act only against one as to whom he occupies the conventional relationship of employee (*The Norland,* 101 F. (2d) 967 (C.A. 9)). This Court has held that a seaman employed by a demise charterer may not maintain an action under the Jones Act against the owner of a vessel on which he is injured (*Callan v. Cope,* 165 F. (2d) 703 (C.A. 9); cf. *Cosmopolitan Shipping Co. v. McAllister,* 337 U.S. 783, 69 S. Ct. 1317, 93 L. Ed. 1692). Thus the same principles govern the determination of the employer-employee relationship in Jones Act cases as in actions brought under the F.E.L.A.

CONCLUSION

Appellant asks this Court to extend to him the coverage and beneficial provisions of the F.E.L.A., even though following this accident he applied for and received, as an employee of Gilpin Construction Company, medical, rehabilitation and conpensation benefits provided by the Workmen's Compensation Act of the State of Oregon (Tr. 14). Under these circumstances, Judge Goodman's rule of F.E.L.A. construction adopted by this Court in the *Gaulden* case is very persuasive (78 F. Supp. at pp. 656-657):

> "The remedial and humanitarian purposes of the Employers' Liability Act in no way compel an interpretation of the contract in favor of an employment or agency relationship. It is not amiss to point out that plaintiff is not without redress for his injuries. The benefits of the Workmen's Compensation Act of California are available to him. It is not for the courts to extend the coverage of the Liability Act into new fields. During the 40 year life of the Employers' Liability Act, Congress, while liberalizing its benefits, has not seen fit to extend the scope of the statute beyond railroading in its true sense."

The district court's findings of fact are clear and unchallenged. They fully support the judgment under the uniform and well-established decisions of this Court and of other federal and state appellate courts. Therefore, the judgment appealed from should be affirmed.

Respectfully submitted,

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